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# Supreme Court of the United States

October Term, 1940.

**No. 253**

EUGENE HIGGINS,

*Petitioner,*

*vs.*

GUY T. HELVERING, Commissioner of Internal Revenue,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## REPLY BRIEF FOR PETITIONER.

The much-delayed brief for the respondent does not seem to meet the arguments advanced by the petitioner, but proceeds to set up contentions that are rather foreign to the situation here presented.

Whether petitioner was carrying on a trade or business in looking after his security investments is by no means the only question presented here. There is primarily the question whether the entire business he had been conducting as an entity since 1889, and with-

out change in its system since 1902, could be split up by the Commissioner, after twenty years recognition of it as one single business, and when the Board found that he was carrying on business as to the concurrent management of his real estate.

Counsel for the respondent correctly state that none of the Treasury Regulations concerning the income tax contains a definition of the phrase "carrying on any trade or business." Those regulations do, however, consistently characterize the various expenses for which credit has been claimed here as normal expenses of a business, which they say may be deducted.

Thus, Article 121 of Regulation 74, of 1932 (which was substantially identical with the earlier Articles of 1924 and 1926) provides that:

> "Among the items included in business expenses are management expenses, commissions, labor, supplies * * * and rental for the use of business property."

The expenses for which deductions were claimed in this case were thus eminently characteristic of "carrying on business."

The suggestion at page 15 that a busy lawyer or surgeon may often find it necessary to take time out for supervising his investments or engage the services of someone to do it for him, begs the question. In the normal case of a busy lawyer or surgeon his investments are entirely collateral, his attention to them merely occasional, and are not his trade or business. Here the management of this vast estate was the daily activity of the petitioner.

The suggestion on page 25 of the respondent's brief that although "there have been some informal rulings which support petitioner's position, there have been in fact no regulations or Treasury Decisions in point, and that the actual practice of the Bureau of Internal Revenue has not been uniform on this issue" and the inference that its practice would be of little aid to the Court in construing the statute, seems to get away from the facts. As far as we have been able to ascertain from all publications on the subject, the actual practice of the Bureau has been uniform up till the time that the present case got into the Board of Tax Appeals. The respondent forgets, too, the numerous decisions of the Board of Tax Appeals and of the Courts cited on pages 57 to 59 of our brief, and the frequent express official acquiescences in those decisions of the Board of Tax Appeals cited on those pages. Those acquiescences are cited from the Treasury Department's own publications, as Acquiescences of the Commissioner.

Counsel for the respondent have failed to point out any instance of any contrary ruling until the present case.

Up to the time that this particular case got before the Board of Tax Appeals, the contentions of the Commissioner appear to have been uniformly that the activities of the taxpayer shown in particular cases did not have that regularity and continuity that would entitle them to be considered as "carrying on business"; while recognizing over and over again that such activities in the management of securities *might* have the elements of continuity and regularity so developed as to constitute "carrying on business."

We do not quite understand the claim that the rulings relied on by us were not promulgated by or with the approval of the Secretary of the Treasury. They were promulgated in the Internal Revenue Bulletins put out by the Treasury Department. In quoting the statement on the front page of the Bulletin that the rulings "do not have the force and effect of Treasury Decisions" counsel omits inadvertently the rest of that quoted sentence, namely: "They are applicable only to the facts presented in the published case."

The suggestion that this Court in *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 467-468, in *Biddle* v. *Commissioner*, 302 U. S. 573, 582, and in *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 52, has recognized that such rulings are of little weight in interpreting the statute, does not seem to be borne out by the decisions so cited.

In the first of those cases, this Court pointed out that there had been no Court rulings and no rulings by the Board of Tax Appeals.

In the second case the Court pointed out that there had been no published rulings.

And in the last case, this Court pointed out that "The practise has not been revealed by any published ruling or act of the Department on which taxpayers could have relied." (308 U. S. 52)

These decisions clearly do not overrule *Helvering* v. *Bliss*, 293 U. S. 144, 157, or *McFeely* v. *Commissioner*, 296 U. S. 102, 108.

The contention that we cite only two rulings promulgated prior to the taxable years involved, namely O. D.

537, 2 C. B. 175 (1920) and O. D. 877, 4 C. B. 123 (1921) seems to overlook entirely the following decisions cited on pages 57-58 of our main brief:

(1929) *Kissel* v. *Commissioner,* 15 B. T. A. 1270 Acquiesced in VIII-2 C. B. 28;

(1929) *Ostenberg* v. *Commissioner,* 17 B. T. A. 738, 746;

(1933) *Croker* v. *Commissioner,* 27 B. T. A. 588, 592, Acquiesced in XII-1 C. B. 4

(Decided in January, 1933 before the petitioner's return for his 1932 income tax return could be made out, and acquiesced in in May, 1933.)

*Bachofen-Von Echt* v. *Commissioner,* 27 B. T. A. 1419;

*Kenan* v. *Bowers,* 48 F. (2d) 263, 266.

The *Wurts-Dundas* and *Van Wart* cases, to which counsel for respondent refers, have proceeded on entirely different bases, and have no application to the question here presented.

The suggestion on page 29 of the brief for respondent that "The ruling most heavily relied upon by petitioner is I. T. 2751, XIII-1 C. B. 43 (1934)" is merely his assumption. That was only one of a multiplicity of decisions cited on pages 57 to 59 of our brief; and by no means the most important one.

The suggestion on page 29 of respondent's brief that the very number of cases in which the question of trade or business was litigated confirms the fact that the actual practice of the Treasury was not uniform either before or

after 1934 *"with respect to this issue"*, quite confuses th question.

There had been no lack of uniformity in the practice o the Treasury up to 1934 with respect to the issue here pre sented. Its contentions seem uniformly to have been, fro 1913 on, in all such cases, that the particular activities pre sented in the given case were not sufficiently regular an continuous to constitute the carrying on of business, bu showed only occasional isolated transactions.

Until the present case reached the Board of Tax Ap peals, we fail to find any instance in which it had bee contended by the Commissioner that the management o one's own securities *could* not be "carrying on business' His uniform contention till then was that, in the particu lar given case before the Court, the activities shown di not present either the regularity or continuity essential t distinguish mere isolated transactions from the regula carrying on of business.

Now the respondent comes out with the square pro position (p. 17): "It is our position that mere persona investment activities never constitute carrying on a trad or business, no matter how much of one's time or of one' employee's time they may occupy." That is a propositio of law which we dispute.

On page 18 of respondent's brief, reference is made t the case of *Union Trust Co.* v. *Commissioner*, 54 F. (2 199. We fail to find in that decision of the Sixth Circu Court of Appeals any such ruling as is suggested in th respondent's brief.

In our main brief we cited the case of *Trustees* o *White* v. *Commissioner*, decided by the Third Circu

Court of Appeals in October last. We left the volume and page of the Federal Reporter blank, expecting to be able to fill it in. That opinion has not yet appeared in the Federal Reporter and we are informed by the publisher that it is being withheld from publication at the request of that court as an application for rehearing is pending. The opinion appears, however, in C. C. H. '40, Vol. 4, p. 10793.

Respectfully submitted,

SELDEN BACON,
ORWILL V. W. HAWKINS,
*Counsel for Petitioner.*